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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

NO. 233

FIDELITY TRUST COMPANY, Trustee Under the Will of John A. Harper, Deceased, Respondent,

v.

THE COLONIAL TRUST COMPANY of Pittsburgh, Pa., Agent for the Shareholders of The Bank of Pittsburgh National Association, Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Attorneys for Petitioner.

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BOULEVARD OF ALLIES, PITTSBURGH, PA.

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(b) That the parties did not agree as to the value of the assets when they entered into an agreement of compromise; 32, 33

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

NO. .....

FIDELITY TRUST COMPANY, Trustee Under the Will of John A. Harper, Deceased, Respondent,

v.

THE COLONIAL TRUST COMPANY of Pittsburgh, Pa., Agent for the Shareholders of The Bank of Pittsburgh National Association,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of The Colonial Trust Company of Pittsburgh, Pa., Agent for the Shareholders of The Bank of Pittsburgh National Association, respectfully shows:

MATTER INVOLVED.

The matter involved arises by reason of the suspension of business of The Bank of Pittsburgh National Association, a national bank, and the stock assessment which was imposed. Fidelity Trust Company, Trustee

Under the Will of John A. Harper, deceased, was the owner of 693, of a total of 60,000, shares of stock of that bank when it suspended business. This stock had a par value of $50 per share and a one hundred percent assessment was made against all the shareholders which, as to the Respondent, amounted to $34,650.

A claim for said assessment plus interest, being a total debt of $35,654.85, was filed with the Respondent, a decedent's estate. After the payment of administration expenses the Receiver was the only creditor of this estate and he agreed to accept all the assets of the Respondent (R. 13a, 14a), consisting entirely of marketable securities with the exception of less than $20 in cash, in settlement of his claim. The Orphans' Court of Allegheny County, Pennsylvania, by its decree of distribution, directed that all the said assets should be delivered in kind to the Receiver "in full of assessment of $50 a share on 693 shrs. Bank of Pitts. N. A." (R. 17a, 18a). This delivery was on July 8, 1932 (R. 20a). Excepted from this decree were assets sufficient to pay the administration expenses and the 693 shares of stock of The Bank of Pittsburgh National Association which were decreed back to the debtor. Had the Receiver taken these 693 shares of bank stock, which he could have done, there would not have been any possibility of this litigation.

The market value of the assets delivered to Petitioner upon the date of their receipt on July 8, 1932, was $30,159.58 as set forth in the Decree of Distribution and the Certificate of Settlement (R. 17a, 18a, 19a, 20a, 21a) which was admittedly less than the amount due the Receiver (R. 13a). The Receiver, apparently believing that title to these assets vested in him upon

delivery without any approval of the Comptroller or order of court, had them transferred to his name promptly after he received them. The Receiver decided to sell the securities the latter part of 1934 and proceeded to obtain the approval of the Comptroller to do so. He was then advised by the Comptroller that approval of the acceptance as well as the sale of these assets was required. At this time the Comptroller also said it was necessary to secure approval of a compromise which it was claimed resulted by reason of the proceedings before the Orphans' Court of Allegheny County, Pennsylvania. The approval of the acceptance and sale of the assets and of the alleged compromise was given by the Comptroller of the Currency by his letter dated January 7, 1935 (R. 15b, 16b) and an order of the District Court of the United States for the Western District of Pennsylvania was obtained on February 13, 1935 (R. 1b, 5b, 6b, 7b, 8b, 22b, 23b, 24b, 25b) when the market value of the assets plus the income therefrom paid to the Receiver amounted to $42,783.35 (R. 51a, 52a). No reason has been found as to why the Comptroller did not direct the Receiver to approve or disapprove of the transaction and proceed to obtain an order of court before these dates. Apparently the Receiver and the Comptroller were of the opinion that such approval and order of court were unnecessary under the existing circumstances because the transaction was only a payment on account or because of the Instructions of the Comptroller to Receivers hereafter discussed.

All the debts of The Bank of Pittsburgh National Association having been paid, the receivership was terminated and as of February 25, 1941, The Colonial Trust Company was elected agent for the shareholders pur-

suant to Act of Congress approved June 30, 1876, as amended (12 U. S. C. A. 197). On December 4, 1941, the remaining assets of the said The Bank of Pittsburgh National Association were turned over to that agent, your Petitioner.

The Petitioner proceeded to liquidate the assets and from the proceeds of the liquidation made partial repayments on the assessments to the shareholders in the following amounts on the following respective dates:

February 20, 1943—First partial repayment of—$3.24 per share;

February 21, 1944—Second partial repayment of—$3.00 per share;

March 3, 1945—Third partial repayment of—$6.00 per share.

No repayments, however, were made to the Respondent until those to which it otherwise would have been entitled amounted to a sum sufficient to liquidate the unpaid amount of the debt which the Petitioner claimed was due it from the Respondent; in other words, the difference between the value of the assets when delivered, which was $30,159.58, and the debt, which was $35,654.85 plus interest.

Not until November 2, 1945, or about thirteen years and four months after the delivery of the assets by the Respondent to the Receiver did the Respondent claim that it should have been treated the same as those shareholders who had paid one hundred percent of their assessment, and at that time it entered suit to recover on that basis. Respondent also claimed the excess received from the income and sale of the assets over and above the debt. It denied any obligation to pay interest on the

unpaid balance of the debt after delivery of the assets to the Receiver. The District Court entered judgment in favor of the Respondent and against Petitioner in the sum of $15,318.26, with interest from November 2, 1945. Petitioner appealed to the United States Court of Appeals for the Third Circuit which affirmed the opinion of the District Court.

Petitioner has contended that the transaction before the Orphans' Court of Allegheny County, Pennsylvania, was in law only a payment on account and therefore it was not necessary to secure the approval of the Comptroller and an order of court since the Act of February 25, 1930 (Title 12 U. S. C. A. #67)[1] only applies in case of a compromise. Petitioner has also argued in the alternative that if the Court should decide that said transaction was in fact a compromise, then that compromise was converted to writing in the form of the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania (R. 17a, 18a, 19a) and the Comptroller approved it (R. 15b, 16b) and the District Court ordered that it be carried out on the basis set forth in that decree (R. 22b, 23b, 24b, 25b).

Petitioner has paid the Respondent on the basis of the compromise set forth in the said Decree of Distribution in the Orphans' Court entered May 24, 1932, but Respondent asks that it be paid on the basis of values

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[1] Act of February 25, 1930 (Title 12 U. S. C. A. #67) provides as follows:

"Any receiver of a national banking association is authorized, with the approval of the Comptroller of the Currency and upon the order of a court of record of competent jurisdiction, to compromise either before or after judgment, the individual liability of any shareholder of such association."

prevailing on February 13, 1935, the date of the decree of the District Court, contending that the compromise was not effective until the latter date.

Briefly, Petitioner claims that the negotiations between the parties in 1932 resulted only in a payment on account and that therefore title to the assets vested in Petitioner upon delivery. In the alternative, Petitioner also contends that if it should be decided that there was, in 1932, a compromise of the claim then that compromise was converted to writing in the form of the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania (R. 17a, 18a, 19a) and in that form the compromise was approved by the Comptroller and an order of court was obtained directing that it be effected on the basis of the values set forth in that decree (R. 22b, 23b, 24b, 25b). Respondent argues that there was no payment on account and that since there was no order of court until February 13, 1935, the compromise agreement made by the parties in 1932 and converted to writing in the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania, did not become effective until the said date of February 13, 1935. Under this theory it is contended that the values on February 13, 1935, would be controlling rather than those agreed to as of May 24, 1932 by the parties and set forth in the said Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, C. 229, #1, 43 Stat. 938; U. S. C. A., Title 28, Section 347.

QUESTIONS PRESENTED.

I.

If it was necessary to obtain from the United States District Court authorization to accept assets in accordance with a decree of the Orphans' Court of Allegheny County, Pennsylvania, and such authorization was in fact obtained, the question is, which is the controlling date:

May 24, 1932, the date of the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania, which evidenced the agreement of compromise between the parties,

or

February 13, 1935, the date of the order of the District Court of the United States for the Western District of Pennsylvania, directing the Receiver to accept the assets in accordance with the Decree of the Orphans' Court of Allegheny County, Pennsylvania?

II.

If the approval of the compromise by the District Court was necessary, should the Respondent be charged with interest to the date of such approval?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Petitioner respectfully submits that the decision of the United States Court of Appeals for the Third Circuit should be brought before this Court for review for the following reasons:

(1) The questions involved are of paramount importance in the administration of the national banking laws and have not been, but should be, settled by this Court.

Where the consideration in a compromise between a Receiver of a national bank and a debtor is property, other than money, it has never been decided whether that property should be valued as of the date of the agreement of compromise between the parties or the date of the order of court directing that the compromise agreed to by the parties be effected. To assist receivers in the performance of their duties this question should be decided. In this case there is the further question of whether or not the agreement of the parties should be controlling rather than the date of the order of the District Court.

(2) The majority opinion of the learned United States Court of Appeals conflicts in principle with the case of *Griggs et al. v. Baumer,* 130 Fed. (2d) 399 (C. C. A. 3, 1942) and *Karn v. Andresen et al.,* 51 Fed. (2d) 521 (District Court, D. Minnesota, Sixth Division, 1931).

(3) The majority opinion of the learned United States Court of Appeals is contrary to law and

works an injustice and is inequitable to the many shareholders other than the Respondent. The opinion of the United States Court of Appeals is in error in concluding among other things the following:

(a) That Petitioner has refused to pay all the shareholders in the same way;

(b) That the parties did not agree as to the value of the assets when they entered into an agreement of compromise;

(c) That the function of an order of court is to, in effect, make an agreement of compromise for the parties rather than order that an agreement previously made by the parties be carried out;

(d) That because the Receiver held the assets more than 2½ years before requesting approval of the settlement the equitable result would have the increase in value inure to the benefit of the Respondent;

(e) That the Petitioner should be penalized for the derelictions of the Receiver and the Comptroller in holding the assets for that length of time;

(f) That the decree of the Orphans' Court of Allegheny County, Pennsylvania, and the order of the District Court can be collaterally attacked;

(g) And that Petitioner is not entitled to interest from May 16, 1932, to February 13, 1935.

(4) The majority opinion of the learned United States Court of Appeals is contrary to "Instructions to National Bank Receivers" in accordance with which the assets in the posses-

sion of receivers of national banks have heretofore been administered.

(5) The majority opinion of the learned United States Court of Appeals entirely ignores the fact that under their opinion they were without jurisdiction.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari may issue out of and under the Seal of this Court, directed to the United States Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court, on a date to be designated, a full and complete transcript of the record of all proceedings in said United States Court of Appeals in the case entitled "Fidelity Trust Company, Trustee Under the Will of John A. Harper, Deceased, Plaintiff, Appellee v. The Colonial Trust Company of Pittsburgh, Pa., Agent for the Shareholdres of The Bank of Pittsburgh National Association, Defendant, Appellant, No. 9708," filed May 6, 1949, to the end that said case may be reviewed and determined by this Court; that the judgment and order of the United States Court of Appeals for the Third Circuit may be reversed by this Court and that your Petitioner may have such other and further relief as to this Court may seem proper.

Respectfully submitted,

THE COLONIAL TRUST COMPANY OF PITTSBURGH, PA., AGENT FOR THE SHAREHOLDERS OF THE BANK OF PITTSBURGH NATIONAL ASSOCIATION

By: C. ROSCOE HOFFMAN,

By: RICHARD W. AHLERS.

Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW.

The opinion of the District Court (Gibson, J.) was filed February 23, 1948 and appears in the record at 39a but is not officially reported.

The opinion of the majority and the dissenting opinion of Judge O'Connell of the United States Court of Appeals for the Third Cirucit were filed May 6, 1949 but have not yet been officially reported.

JURISDICTION.

The judgment sought to be reviewed is a final judgment of the United States Court of Appeals for the Third Circuit affirming a decision of the District Court of the United States for the Western District of Pennsylvania. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, C. 229, #1, 43 Stat. 938; U. S. C. A., Title 28, Section 347.

STATEMENT.

The essential facts are summarized in the Petition for Certiorari under the title "Matter Involved", *supra.*

SPECIFICATIONS OF ERROR.

1. The learned United States Court of Appeals for the Third Circuit erred in holding that the value of the assets should be taken as of February 13, 1935, the date of the order of the District Court.

2. The learned United States Court of Appeals for the Third Circuit erred in refusing to hold that the assets should have been valued in accordance with the valuations agreed to by the parties and set forth in the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania, dated May 24, 1932.

3. The learned United States Court of Appeals for the Third Circuit erred in refusing to hold that it was proper for Petitioner to charge Respondent interest on the unpaid balance of the debt from May 16, 1932, the date when all the assets of the Harper Estate were turned over to the Receiver, to February 13, 1935, the date of the order of the District Court.

SUMMARY OF ARGUMENT.

(a) The parties themselves agreed to the compromise proposition which included values of the assets. This agreement was converted to writing in the form of the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania. The Comptroller of the Currency approved the compromise proposition and an order of the District Court was obtained expressly directing that the compromise be consummated in accordance with the said decree of the Orphans' Court. The Respondent never withdrew his offer of compromise and never demanded the return of the assets. Therefore, after the order of the District Court was obtained, the proceedings could not be collaterally attacked. Under this theory of the case the compromise became effective on February 13, 1935, the date of the order of the District Court, but the consummation of the compromise was in accordance with the terms of the agreement between the parties set forth in the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania.

(b) The transaction between the parties was only a payment on account and therefore no approval of the Comptroller of the Currency or order of court was required. The reason for this is that a value was placed upon the assets when they were delivered to Petitioner and under such circumstances delivery in law is the equivalent of the payment of so much money. If this argument is sustained the title to the assets vested in Petitioner upon delivery on July 8, 1932, without the necessity of obtaining the approval of the Comptroller of the Currency or an order of court.

(c) If it should be decided that there was a compromise, Petitioner is entitled to interest on the unpaid balance of the debt from May 16, 1932 to February 13, 1935, for the reason that in such case it was legally impossible for Petitioner to sell the assets before the latter date and, consequently, no funds were available to liquidate the indebtedness. To hold otherwise would be inequitable to those shareholders who paid their assessments on time and in cash and to those who, by agreement with the Comptroller, paid their assessments on a quarterly basis. Those in the last mentioned category were even charged interest on their unpaid balances.

ARGUMENT.

I.

The questions involved are of paramount importance in the administration of the national banking laws and have not been, but should be, settled by this Court.

The Respondent insists that there was a compromise in this case. In a compromise the debtor negotiates with the receiver and effects a compromise agreement. The statute then provides that the Comptroller of the Currency must approve this compromise agreement and that then an order of court of competent jurisdiction must be obtained. In other words, in practice the terms of the compromise agreement made by the debtor and the Receiver are approved by the Comptroller and the order of court then authorizes and directs the Receiver to consummate the transaction in accordance with the terms of that compromise agreement. If the agreement of compromise provides that assets other than money are to be turned over, as was done in this case, Petitioner contends that the values agreed to by the parties in the form of the compromise agreement and converted to writing in the Decree of Distribution on May 24, 1932, are the proper amounts of credit to be given the debtor. The learned United States Court of Appeals, on the other hand, decided that the debtor should be credited with the values prevailing at the time the order of the District Court was signed on February 13, 1935, because the compromise was not effective until that time. But this would mean that the parties intended that the compromise was to be effective on the basis of values at

some future undetermined time and there is absolutely nothing in this record to indicate that the parties had any such intention.

If the date of the order of the District Court, and not the date of agreement of compromise between the parties, is to be taken as the controlling date, then it would be practically impossible for a receiver of a national bank to administer his trust. Receivers were generally instructed to accumulate cases and the Comptroller's letters often read that "you will include in some future petition to be presented to the court in connection with other completed matters, a request for the approval of the court." An illustration of the last quotation can be found in R. 20b. If court orders are to be the controlling factor instead of merely being approval of a contract or agreement previously entered into by the parties it means that in future receiverships it will be necessary for receivers to be in court every day a compromise is negotiated. This would be an impossibility because of the time required in obtaining the approval of the Comptroller and an order of court.

When a debtor presents a compromise proposition which is acceptable to the Receiver it is first sent to the Comptroller of the Currency for approval. Sometimes, during the thirties, when this case arose, because of the conditions of the times and the resulting large volume of work which the Comptroller was called upon to perform, it took a month or longer before a reply was received. If and when approval of the Comptroller was had, the receiver then turned over the compromise agreement with that approval to legal counsel for the preparation of a petition to be presented to court for

authority to execute the agreement of compromise. This step also frequently required considerable time. If the critical time is the date of the court order, it necessarily follows that much time will elapse between the time when the compromise offer is received from the debtor and the signing of the order of court. Where assets other than money are transferred in liquidation of a debt, due to the fluctuation of security values during that interim, the parties themselves would never be making the agreement. It would depend upon when the lawyer presented the petition and when the order of court was signed. And, as said by Judge O'Connell in his dissenting opinion, "By adopting such a date, we have the incongruous result that neither the stockholder nor the Comptroller of the Currency has the slightest idea of the values they are said to have agreed upon until the court actually signs the decree, probably days or weeks later; and the court likewise, unless it consults the ticker-tape, is at sea at the time of entering the decree."

Before the Comptroller approves a compromise proposition made by a debtor it would, of course, be necessary for him to have available information disclosing just what the proposition of the debtor was. Otherwise, the Comptroller would never know what he was approving. In this case, the Comptroller stated in his letter of approval (R. 15b) that the assets were delivered to the Receiver pursuant to a decree of the Orphans' Court. It is therefore respectfully submitted that the Comptroller was familiar with the details of the decree and when he approved the transaction he also approved these values as a part of the transaction.

However, in connection with the value of the assets transferred by the Respondent to the Petitioner in this case, the majority opinion of the learned United States Court of Appeals says that "we do not find that the parties made any valuation here. An Orphans' Court inventory indicates no agreement by a creditor that the property was worth what the inventory showed." Of course, and Petitioner has never at any time during this dispute contended that the inventory indicated any agreement. It justifies its contention for several other reasons. First, there is the colloquy between counsel for the Respondent and the Receiver at the time of the audit of the account of Respondent before the Orphans' Court of Allegheny County, Pennsylvania, which is set forth in footnote 1 of the dissenting opinion of Judge O'Connell in this case and which is as follows:

> "1 *Mr. Stoner* (counsel for estate): The assets of the estate are several thousand dollars less than an amount sufficient to pay the Receiver of the Bank of Pittsburgh N. A., but I understand Mr. Frazer, representing the Receiver, is prepared to put upon the record the fact that he will accept the securities composing this trust, other than the Bank of Pittsburgh stock, in full of the liability of the trust to the Bank of Pittsburgh, Receiver Mr. C. O. Thomas.
>
> "*Mr. Frazer* (counsel for receiver): That is right. The amount of the claim is $34,650 and interest to date amounts to $1004.85, a total of $35,654.85. The Receiver will accept the securities in the estate in satisfaction of his claim."

Also, Respondent informed the parties interested in the Harper Estate that the value of the assets was

less than the debt due the Receiver. This is set forth in footnote 2 of the said dissenting opinion of Judge O'Connell and reads as follows:

"2 The market value of the securities shown to be on hand, listed on pages 2 and 3 of the account, is less than the claim of the Receiver for the Bank of Pittsburgh, N. A. Fidelity Trust Company notified Alberta Harper Irish, Florence Harper Byram and Lydia E. H. Brush, children of John A. Harper and the life tenants under his will, that the Receiver of the Bank of Pittsburgh, N. A. would appear at the audit of this account on May 1, 1932 and would bid up to $34,650 with interest, for the securities shown to be in the hands of the Trustees, exclusive of The Bank of Pittsburgh stock, and that if they cared to bid more than that amount they should so inform the accountants or appear at the audit and make an offer therefor. A list of the securities, together with the present market value, is attached hereto and marked Exhibit 'A'."

Further, since this compromise involved the delivery of assets of a decedent's estate over which the Orphans' Court of Allegheny County, Pennsylvania, had exclusive jurisdiction, the Respondent was without authority to make delivery thereof unless the compromise was made a part of the decree of distribution of the said Court and that Court ordered that such delivery be made. This was done and, as it relates to the transaction here involved, said decree is as follows:

"DECREE

And now, to wit, May 24th, 1932, the account in this case having been filed and confirmed nisi,

and having been examined and audited by the Court, upon consideration thereof, it is agreed that the account be confirmed absolutely and that the funds in the hands of the accountant, to wit, $32,759.12, be paid in accordance with the schedule of distribution hereto attached and made a part hereof, unless exceptions be filed within ten days.

PER CURIAM.

Balance Per First Account filed		127043.05	
			$32,759.12
Deficit per supplemental audit statement	177.13		
Reduction in value of securities to conform to market values at 5/14/32	16407.80		
Reduction in carrying values of 693 shrs. Bank of Pittsburgh N. A. owing to Bank failure per supplemental audit statement filed	77699.00	94283.93	
Balance for Distribution			$32,759.12
To Fidelity Trust Company, Compensation Principal-Personalty 2% comm. on $92,363.84	1847.27		
Principal-Realty 2% Commission on $37,563.34	751.27		
		2598.54	

To Fidelity Trust Company, Trustee in trust for purposes specified in will, viz:	
693 shrs. Bank of Pittsburgh, N. A.	1.00
To C. O. Thomas, Rec. of Bk. of Pitts. N. A. Balance in full of assessment of $50 a share on 693 shrs. Bank of Pitts. N. A.	
13 shrs. General Cable Corp. Class A @ 1½	19.50
43 shrs. General Cable Corp. Class A Warrants	0.00
144 shrs. General Cable Corp. Common @ ¾	108.00
43 shrs. General Cable Corp. 7% Pfd. @ 6⅛	263.38
20 shrs. Pittsburgh Coal Co. Pfd. @ 20	400.00
$6500 Bds. General Cable Corp. 5½% 1st Mtge. Series A due 7/1/48 @ 43¾	2843.75
$ 600 Bds. Chicago, Milwaukee, St. Paul and Pacific Railroad Co. 5% 50 yr. Mtge. due 2/1/75 @ 20	120.00

$2400 Bds. Chicago, Milwaukee, St. Paul and Pacific Railroad Co. 5% Conv. Adj. Mtge. due 1/1/2000 @ 4	96.00		
$3000 Bds. Pittsburgh & Allegheny Telephone Co. 5% 1st Mtg. due 12/1/49 @ 100½	3015.00		
$2000 Bds. Pittsburgh Terminal Warehouse and Transfer Company 5% 1st. Ref. Mtge. 30 yr. due 11/1/36 @ 10	200.00		
$3000 Bds. Southern Rwy. Co. 6½% Deb. and Gen. Mtge. due 4/11/56 @ 30	900.00		
$2000 Bds. West Penn Power Co. 5% 1st Mtge. Series "E" due 3/1/63 @ 101¼	2025.00		
Interest in the following participation mortgages:			
Installment Mtge. Fund 6%	16150.00		
A. Shapiro Mortgage 6%	4000.00		
Cash	18.95	30159.58	
			$32,759.12"

It is respectfully submitted that all prior negotiations of the parties were merged in this decree and this decree therefore represents the agreement of the parties converted to writing.

Additional evidence of the agreement as to the values of the assets is contained in a letter from Mr. A. P. Reed, then Vice President of Fidelity Trust Company, the Respondent, to the Comptroller of the Currency, dated July 8, 1932 (R. 20a, 21a), which is as follows:

"CERTIFICATE OF SETTLEMENT OR SALE

July 8, 1932

Comptroller of the Currency
Washington, D. C.

Sir:

Under an agreement of settlement made with C. O. Thomas, Receiver of The Bank of Pittsburgh, N. A., Pittsburgh, Pennsylvania, we hereby certify that on July 8, 1932, we delivered to said Receiver the sum of $18.95 in cash and securities listed below awarded under decree filed in Orphans' Court of Allegheny County to No. 205 January Term, 1932:

13 shrs.	General Cable Corp. Class "A" @ 1½	$ 19.50
43 shrs.	General Cable Corp. Class "A" Warrants	0.00
144 shrs.	General Cable Corp. Common @ ¾	108.00
43 shrs.	General Cable Corp. Preferred @ 6⅛	263.38

20 shrs.	Pittsburgh Coal Co. Pfd. @ 20	400.00
$6500 Bonds	Gen. Cable Corp. 5½s 47 "A" @ 43¾	2,843.75
600 Bonds	Chic. Milwau. St. P. & Pac. 5s 75 @ 20	120.00
2400 Bonds	Chic. Milwau. St. P. & Pac. 2000 @ 4	96.00
3000 Bonds	Pgh. & Alle. Tel. 1st M. 5s 49 @ 100½	3,015.00
2000 Bonds	Pgh. Terminal Warehouse & Trans. Co. 5% 1st Ref. Mtge. 36 @ 10	200.00
3000 Bonds	Southern Ry. Co. 6½% Deb. & G. M. 56	900.00
2000 Bonds	West Penn Power Co. 5% 1st Mtg. Ser. "E" 63	2,025.00
	Interest in the following Participation Mortgages	
Installment Mortgage Fund 6%		16,150.00
A. Shapiro Mortgage 6%		4,000.00
Cash		18.95
		$30,159.58

In full settlement of the stock assessment liability of the Estate of John A. Harper, Deceased, as owner of 693 shares stock @ $50 per share—$34,650.000.

Respectfully,

A. P. REED"

By this commnication Respondent certainly agreed to the stated values of each of the assets involved. Surely, the foregoing is ample proof of the contention of the Petitioner that the parties actually did agree as to the values of the assets to be turned over in compromise of the claim and Judge O'Connell so decided in his dissenting opinion.

Where parties to a dispute fix a value to the property transferred in compromise of a claim the delivery of that property in law is equivalent to the payment of that much money (Volume 1, Cyclopedia Law and Procedure 335; Griffith v. Creighton, 81 Mo. App. 1; Volume 1 American and English Encyclopedia of Law, Second Edition, 418; Howard et al. v. Norton, 65 Barb. (N. Y.) 161), and in this case that would have resulted only in a payment on account so that no approval of the Comptroller and no order of court would have been required. In Pennsylvania, payment of a debt by the delivery of specific articles, not money, is recognized (Hamilton v. Moore, 4 W. & S. 570; Richabaugh v. Dugan, 7 Barr. 394; Heath v. Page, 48 Pa., 130 at 143).

If the Respondent did not intend that the assets should be delivered at the stated prices, why did it notify the interested parties in the Harper Estate that the value of these assets was less than the debt and that they would be turned over to the Receiver unless a bid was made by said parties in an amount greater than the bid of the Receiver and that if they wished to make such a higher bid they should appear at the audit and do so (R. 16a). Also, as said in the dissenting opinion of Judge O'Connell:

"It is not inapposite to note that, had the Harper Estate and the Receiver not intended such values to

be binding upon all interested parties, the trustee of the estate could and should have liquidated the assets so as to have a fund to apply on account of the debt due the Receiver."

It is therefore respectfully contended that there was, in fact, an agreement between the debtor and the Receiver as to the value of the assets to be turned over in settlement of the claim. This agreement was a part of the compromise proposition made by the debtor to the Receiver which was converted to writing in the form of the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania. This proposition, as an offer of compromise, was never terminated by the Respondent. In accordance with the applicable rule set forth in the Restatement of the Law of Contracts, Section 34, the offer of compromise, "until terminated gives to the offeree a continuing power to create a new contract by acceptance of the offer." This offer was approved by the Comptroller and an order of court directed the Receiver to effect this compromise proposition. The terms of this compromise agreement, including the values placed upon the assets by the parties, were executed and the transaction was completed. The order of the District Court directing that the compromise be effected provided that the Receiver should accept the assets "in accordance with the decree of the Orphans' Court in and for Allegheny County, Penna., at No. 205 January Term, 1932." The substance of that decree, which includes the value of the assets, as it is pertinent to this case, appears in R. 17a, 18a and 19a. It also is heretofore set forth on page 20 and may be found at footnote 3 of the dissenting opinion of Judge O'Connell.

Judge O'Connell stated in substance that this compromise agreement was sanctioned by the Orphans' Court of Allegheny County, Pennsylvania, and the District Court then directed that it be carried out. Therefore, it may not be attacked, modified or changed in a subsequent collateral proceeding. Furthermore, since the compromise proposition was included in the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania, if that proposition is to be changed in any way it would then first be necessary to have this decree of distribution amended.

It is respectfully submitted that when consideration is given to the fact that one of the parties was a large trust company, as Trustee, in the City of Pittsburgh, and the other a receiver of a large national bank which had suspended business, it is most difficult, if not impossible, to conclude that such parties did not take into consideration the value of the assets, amounting to more than $30,000, at the time of their transfer. As said by Judge O'Connell in his dissenting opinion, "I cannot believe that a compromise was effected with an understanding that the value of the assets was to be subsequently determined by their market value on whatever date the District Court approving the compromise happened to take statutory action." Especially is this true, having in mind the contents of footnote 4 in the dissenting opinion of Judge O'Connell, which reads as follows:

"4 I point out in passing that, by virtue of the provisions of 12 U.S.C. #197, 12 U.S.C.A. #197, the parties before us are, in effect, the same as those which engaged in the extensive negotiations culminating in the 1935 court order. It was the Harper

estate which tendered the assets at stated values in compromise. The Harper estate advised the Orphans' Court, with a detailed list, that the assets were smaller than the assessment. The Harper estate was aware that the beneficiaries, to keep the assets, had to bid a sum greater than the assessment. The Harper estate advised the Comptroller that the assets as valued were "in full settlement." The Harper estate made no move to block the approval of the Comptroller or authorization of the district court. The liquidation of the closed bank was conducted throughout upon the theory that the Harper estate had discharged its liability by an 85% payment in settlement. Why should a court now intervene and permit the Harper estate even to assert a value contrary to that which it has itself assigned over a period of years? Cf. the principles of collateral estoppel and law of the case."

In fact, what more than they did do could the parties have done to evidence an agreement as to the value of the assets involved. Certainly, they furnished such ample proof of an understanding in this regard that it cannot now be questioned.

If the decision of the learned United States Court of Appeals should be sustained in this case then it is most respectfully submitted that the court, rather than the parties themselves, would have made the compromise proposition. This is true for the reason that the parties did agree to the values as of May 24, 1932, as heretofore set forth, and then the court changed that agreement by substituting different values as of February 13, 1935. This should not be done because the cases expressly set forth that a court, in approving compromise

propositions, merely acts in an administrative capacity. In other words, it only directs that an agreement already made be carried out and may not itself make an agreement for the parties. *Mitchell v. Joseph,* 117 F. 2d, 253, 255 (C. A. 7, 1941). See also *Hulse v. Argetsinger,* 18 F. 2d, 944, 945 (C. A. 2, 1927); *Griggs v. Baumer,* 130 F. 2d, 899, 901 (C. A. 3, 1942); and *Oosterhuis v. Palmer,* 137 F. 2d 322, 325 (C. A. 1943). If the present decision prevails, it will have a decided effect upon all other compromises made by a national bank receiver where assets other than money are turned over to the receiver.

II.

The majority opinion of the learned United States Court of Appeals conflicts in principle with the case of Griggs et al. v. Baumer, 130 Fed. (2d) 399 (C. C. A. 3, 1942) and Karn v. Andresen et al., 51 Fed. (2d) 521 (District Court, D, Minnesota, Sixth Division, 1931).

It is respectfully requested that it be kept in mind that the compromise proposition in this case, which was converted to writing in the form of a Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania, set forth the values at which the assets were to be transferred to the Petitioner pursuant to that decree of distribution. This decree is as follows:

"And now, to wit, May 24th, 1932, the account in this case having been filed and confirmed nisi, and having been examined and audited by the Court, upon consideration thereof, it is agreed that the account be confirmed absolutely, and that the funds in the hands of the accountant, to wit, $32,759.12, be paid in accordance with the schedule of distribution hereto

attached and made part hereof, unless exceptions be filed within ten days.

Per Curiam."

Then follows a detailed list of the assets with their respective values totaling $32,759.12, of which the Receiver of The Bank of Pittsburgh National Association was decreed $30,159.58.[2] Thereafter, the District Court of the United States for the Western District of Pennsylvania ordered that the Receiver should accept these assets in accordance with this decree of distribution. Now, in this proceeding, the Respondent is endeavoring to change those terms of the compromise. In other words, the Respondent is attempting to have the compromise made on a basis much different from that set forth in said decree of distribution, to which the parties had agreed and which was approved by the Comptroller and ordered to be effected by the said District Court. In the said case of *Griggs v. Baumer,* in speaking of the order directing the receiver to consummate a compromise proposition, the court said:

"Once such an order is signed, the purchaser named therein is entitled to rely upon it, and the court cannot in the absence of fraud or mistake rescind that order, even for the laudable purpose of securing for the creditors and stockholders of the bank a substantial increase in the price of the assets sold."

In the instant case a compromise proposition was made by the debtor to the Receiver. That proposition was transmitted to the Comptroller who approved it and the Receiver secured an order of court directing the

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[2] See page 20 for decree of distribution in detail.

Receiver to give effect to the compromise. All this was done without the debtor ever having indicated any thought of withdrawing his compromise proposition. This proposition, converted to writing in the form of the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania, as heretofore set forth, contained stated values of all the assets. Under these circumstances, it is pertinent to give consideration to a portion of the opinion of the said case of *Karn v. Andresen* which reads as follows:

> "I find, however, from the evidence, that the offer made by the plaintiff to the receiver, in settlement of all claims made against him by the receiver growing out of his acceptance as a director of the bank, was accepted by the receiver, approved by the state district court, and Dr. Karn notified of its acceptance, prior to any attempt on his part to withdraw the offer, and that all that remained to be done were the formal and ministerial acts of signing the covenant not to sue and transferring the receiver's certificates. These acts would only be evidence of the agreement, and not the agreement itself.
>
> "Had Dr. Karn withdrawn his offer at any time prior to its approval by the court, the situation would have been different."

III.

The majority opinion of the learned United States Court of Appeals is contrary to law and works an injustice and is inequitable to the many shareholders other than the Respondent. The opinion of the United States Court of Appeals is in error in concluding, among other things, the following:

(a) That Petitioner has refused to pay all the shareholders in the same way;

(b) That the parties did not agree as to the value of the assets when they entered into an agreement of compromise;

(c) That the function of an order of court is to, in effect, make an agreement of compromise for the parties rather than order that an agreement previously made by the parties be carried out;

(d) That because the Receiver held the assets more than 2½ years before requesting approval of the settlement the equitable result would have the increase in value inure to the benefit of the Respondent;

(e) That the Petitioner should be penalized for the derelictions of the Receiver and the Comptroller in holding the assets for that length of time.

(f) That the decree of the Orphans' Court of Allegheny County, Pennsylvania, and the order of the District Court can be collaterally attacked;

(g) And that Petitioner is not entitled to interest from May 16, 1932 to February 13, 1935.

The majority opinion, in part, contains the following language:

> "The appellant's argument in justification of its refusal to pay the trustee of the Harper estate in the same way it has paid dividends to the other shareholders of the defunct bank rests on the doctrine of consideration at common law."

If the learned Court intended to convey the impression that Petitioner was not paying Respondent on the same basis as it paid all other shareholders, it is altogether incorrect as all shareholders in the same category as Respondent have been paid in accordance with the same method of computation as that for which the Petitioner is contending in this case.

The majority opinion of the learned United States Court of Appeals is altogether predicated upon the assumption that the parties did not agree as to the values of the assets when they were turned over to the Petitioner. For the reasons heretofore set forth, and especially those contained in the dissenting opinion of Judge O'Connell, it is respectfully submitted that there actually was such an agreement as to the value of the property decreed and delivered to Petitioner. In fact, what other evidence of an agreement as to values could possibly have been furnished by the parties than those set forth in this case?

The only reason assigned by the said majority opinion of the Court for its decision that there was no agreement as to values is that an Orphans' Court "inventory" indicates no agreement by a creditor that the property was worth what the inventory showed. Of course, this is true, but the Petitioner has never con-

tended otherwise. Petitioner has only argued that the values set forth in the decree of distribution which evidenced the agreement of the parties as to the terms of the compromise, rather than those in the inventory, were agreed to and Judge O'Connell so found. Nothing is said in the majority opinion about the values set forth in the decree of distribution and those in the Certificate of Settlement or Sale, the latter of which was signed by the Respondent, and therefore certainly agreed to by it (R. 20a). Also, nothing whatsoever is said in the majority opinion about the other agreements as to values set forth in the dissenting opinion of Judge O'Connell. Furthermore, in this case the values in the inventory were decreased in the decree of distribution so as to conform to the actual values on the date of the audit in the Orphans' Court[3] so that, if it is decided that the parties agreed to the values in the inventory as the

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[3] DECREE OF DISTRIBUTION

Balance per First Account filed		127043.05	
Deficit per supplemental audit statement	177.13		$32,759.12
Reduction in value of securities to conform with market values at 5/14/32	16407.80		
Reduction in carrying value of 693 shrs. Bank of Pittsburgh N.A. owing to bank failure per supplemental audit statement filed	77699.00	94283.93	
Balance for Distribution			$32,759.12"

worth of the assets they were evaluating the assets on a basis other than the actual market values at the time. This, they certainly would not have done.

The majority opinion of the learned United States Court of Appeals states that it is not an easy question to determine when the compromise in this case became effective. The said opinion further states that "A strong argument can be made that the approval, when given, validates the settlement as of the time the Receiver and shareholder made it." It was concluded, however, that the compromise was to be given effect as of the date of the decree of the District Court on February 13, 1935, rather than on the basis of the agreement of the parties set forth in the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania, dated May 24, 1932. The said opinion likewise states that this result is harmonius with the wording of the statute and that it recognizes the status of the Comptroller of the Currency as the Federal official primarily responsible for the conduct of the receivership. It is also said that the Comptroller's regulations specifically indicate this official's understanding that final statutory approval must precede an effective compromise. No objection can be made to any of these assertions. However, they are equally true if the agreement of compromise made by the parties, as evidenced by the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania, dated May 24, 1932, is effective. In either event, whether it is the date of the order of the District Court on February 13, 1935, or May 24, 1932, the date of the Decree of the Orphans' Court of Allegheny County, Pennsylvania, which set forth the agreement of the parties, it would be harmonious with the

wording of the statute and it recognizes the status of the Comptroller as the authority primarily responsible for the conduct of the receivership.

Of course, a compromise made by a national bank receiver is not effective until an order of court is obtained, but the question then is, not *when* it becomes effective but *what* becomes effective; in other words, *what* were the terms of the compromise approved by the Comptroller and ordered to be effected by the District Court. The statute provides that the Comptroller shall "approve" the compromise proposition. The word "approve", it is respectfully submitted, presupposes that sanction is being given to something already done. If the values are to be taken as of the date of the order of court then, in reality, the Comptroller would be approving something to take place in the future and the Court would be making a new agreement. Simply to approve the acceptance of securities without an understanding as to values is to perform a meaningless act because it is not known what is being approved unless and until a value is placed upon the assets.

The said opinion further states that an analogy may be drawn to the case of a receiver in bankruptcy whose proposed sale of property of a bankrupt estate does not become effective until court approval is obtained. But when the court approval is secured the sale is consummated on the terms of the "proposed sale" and surely a court should not approve a sale without knowing what the terms of that sale were. The order of the District Court, in this case, was that the Receiver should accept the assets "in accordance with the decree of the Orphans' Court in and for Allegheny County, Penna., at No.

205 January Term, 1932," and in that decree the value of the assets is set forth in great detail. The court states that Petitioner concedes that the compromise settlement has but the effect of an offer until statutory approval is given but, again, it is respectfully submitted that the question then arises as to *what* the terms of the offer were. In this connection the Court says that its position supports a conclusion that the time the "bargain" became effective was the time when the order of court was signed but still the question remains as to *what* the terms of the "bargain" were.

The said opinion of the learned United States Court of Appeals continues as follows:

> "Moreover, in this case, the Receiver took over all of the Harper assets and held them for more than 2½ years before requesting approval of the settlement. If the securities had declined in value and the Comptroller had disapproved the settlement, there is no doubt that the Harper estate would have continued liable to the Receiver for the deficiency in the payment of its assessment. It seems to us the equitable result that the increase in value which occurred during that time should accrue to the benefit of the shareholder."

It is respectfully submitted that the Receiver, in this case, should not be criticized for holding the assets for more than 2½ years before requesting approval because it is reasonable to conclude that both parties were of the opinion that such approval was unnecssary. Whether the Receiver held the assets one day or 2½ years is unimportant because, if the theory of the Respondent is accepted, it would have been entitled to any

appreciation in values and therefore could not possibly have suffered any loss. On the other hand, if the theory of Petitioner is accepted, title vested immediately upon delivery of the assets on May 24, 1932, or ten days thereafter allowed for exceptions, or on the date of the order of the District Court in February, 1935, but at the values agreed upon by the parties and set forth in the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania. Then, in the event of any appreciation over and above the values set forth in the decree of distribution, it would have inured to the benefit of the Petitioner as Respondent was not entitled thereto by reason of his having agreed to the values at which the assets should vest in Petitioner. Therefore, any criticism of the Receiver by the Respondent for not having obtained approval of the settlement sooner is not justified.

In this last quotation from the majority opinion of the learned United States Court of Appeals reference is made to a supposition that the Comptroller might disapprove of a settlement where the assets had declined in value. In this case the Receiver was given all the assets which the Respondent had. Under these circumstances, it is respectfully submitted that it is inconceivable that the Comptroller would not have approved the transaction. He could not have accomplished anything by withholding his approval because he could not possibly have secured any additional assets. This is supported by the dissenting opinion of Judge O'Connell when he states in part that:

> "I find it difficult to believe that any district court would, or could, in the exercise of its discretion refuse to approve a compromise agreement made in good faith between a receiver of a national bank

and a stockholder under which such debtor turned over to the receiver securities having a readily ascertainable market value, even where the receiver or Comptroller delayed an unreasonable length of time between the receipt of such securities and the seeking of approval of the compromise agreement by the district court and, in the interim, the market value of the securities declined."

As set forth in footnote 8 to the majority opinion of the learned United States Court of Appeals, the debtor is charged with notice that a receiver of a national bank must secure the approval of the Comptroller and an order of court when a compromise is made. It is respectfully submitted that under such circumstances as existed in this case the debtor could not stand idly by because the facts in this dispute indicate that all parties were of the opinion that the proceedings before the Orphans' Court were all that were required and no approval of the Comptroller or order of court was necessary. Otherwise, surely the Comptroller and the Receiver would have promptly proceeded to obtain that approval and order of court when the assets were delivered to the Receiver. And when this approval and order of court were not obtained the debtor, to protect his own interests, should have prompted the Receiver to secure them as he is charged with knowledge that they were necessary.

If there was any neglect in this case it was not on the part of the shareholders of The Bank of Pittsburgh National Association whom the Petitioner in this case represents. It was only due to the neglect of the Receiver and the Comptroller of the Currency and, principally the Comptroller, since he is the supervising agent

responsible for the proper liquidation of the assets of the receivership. As stated by Judge O'Connell in his dissenting opinion, "If the receiver's estate has suffered under such circumstances, it may well be that some question of surcharge might be lodged against the Receiver but surely the district court would not penalize the innocent stockholder for the dereliction in duty of the receiver or Comptroller." Also, at the very inception of this matter, the Receiver and Comptroller had control over the 693 shares of the stock of The Bank of Pittsburgh and permitted it to be decreed back to the estate. Had this not been done Petitioner would not now be confronted with this claim. This is just another act over which the shareholders had no control and for which the Respondent, after more than thirteen years had passed, attempted to hold Petitioner responsible.

At the time this compromise was made and when the approval of the Comptroller and the order of court were had the shareholders legally were not in a position wherein it was possible for them to intervene. Nevertheless, according to the opinion of the learned United States Court of Appeals, as stated by Judge O'Connell in his dissenting opinion, the innocent shareholders are being penalized. The end of the last quotation from the opinion of the learned United States Court of Appeals, quoted at page 37 hereof, contains a sentence to the effect that it seemed to the court that the equitable result was that the increase in value should accrue to the Respondent in this case. Certainly, as just stated, where the shareholders are not at fault and could not have done anything about what the Receiver and Comptroller did or did not do, it is not equitable to charge these shareholders with any shortcomings of the Re-

ceiver and the Comptroller. And, also, during the period when this dispute arose, the Respondent was in a position to interpose the objections and claims which it is now presenting but it did not do so. This thought was expressed by Judge O'Connell in footnote 4 of his dissenting opinion in the following language:

> "The liquidation of the closed bank was conducted throughout upon the theory that the Harper estate had discharged its liability by an 85% payment in settlement. Why should a court now intervene and permit the Harper estate even to assert a value contrary to that which it has itself assigned over a period of years? Cf. the principles of collateral estoppel and law of the case."

The Receiver applied the profit made on the sale of the assets in payment of the debts of the receivership exactly the same as he applied profits from the sale of any other property. In this way all the creditors and, eventually, all the shareholders, including the Respondent, benefited. Under the theory of the majority opinion of the learned United States Court of Appeals only one shareholder, the Respondent, would benefit and more than 1100 would be penalized.

The majority opinion of the learned United States Court of Appeals says that "When the Trustee of that estate turned over its assets to the Receiver on May 16, 1932, it had done everything it could to pay the assessment. From that time the Receiver had full control of the securities and was entitled to collect the income on them. The question of interest arises now only because the Receiver delayed so long a time in obtaining the approval of the settlement. Under these circumstances,

we think there is no equitable basis for a claim of interest."

The question of interest in this case does not arise because the Receiver delayed such a long time in obtaining approval of the settlement. By virtue of the decision of *McCarty v. Gault,* 24 Fed. Supp. 977 (District Court, D. Oregon, October 3, 1938), interest is payable on all assessment debts until paid. The Respondent, under its theory, was charged with knowledge that the transfer of the assets to the Receiver was not effective until an order of court was secured. Until that transfer was effective it, therefore, knew that the securities could not have been sold to provide a fund to pay the debt. Also, when property is turned over in payment of a debt and the value of that property at the time it is so turned over falls short of the amount of the debt, as was true in this case, interest runs on the whole debt until paid. *West Republic Mining Co. v. Jones & Laughlin,* 108 Pa. 55, 69; *McCormack v. Sharples,* 254 Pa., 541, 542, 543, 99 A. 155.

If it is correct that from May 16, 1932, the date when it is said that the assets were turned over to the Receiver, the Receiver, "had full control of the securities and was entitled to collect the income on them," then it must follow that title to those assets was then vested in the Receiver. Otherwise, he would not have been entitled to collect the income. But, according to the theory of the Respondent, title did not vest until February 13, 1935, the date of the order of court. If the Receiver was, in fact, entitled to the income then, as stated, the title to these assets had already vested and

this without having obtained the approval of the Comptroller and an order of court, which indicates that the transfer of the assets must only have operated as a payment on account or must have been consummated by reason of the Comptroller's instructions to Receivers hereafter discussed, in either of which events no approval of the Comptroller or order of court was necessary.

In the majority opinion of the learned United States Court of Appeals it is decided that no interest whatsoever is due from the Respondent, notwithstanding the fact that payment of the debt could not have been made under the theory of the learned United States Court of Appeals until February 13, 1935. Consequently, the Respondent is placed in the same category as one who paid his entire assessment in cash when due on November 24, 1931, but if the Harper Estate had in fact done this, it would have been necessary for it to liquidate the securities at the then market value. Because Respondent says that title to the assets did not vest in the Petitioner until February 13, 1935, it follows that the Petitioner could not have sold these assets until then and therefore could not have realized funds with which to liquidate the debt until that time. What the Respondent is doing is claiming the benefit of the appreciation in value and at the same time denying liability for interest. This, it is most respectfully submitted, is inequitable. Especially is this true when these transactions were altogether beyond the control of the Petitioner and the shareholders whom it represents. Those who paid their assessments on a quarterly basis, beginning November 24, 1931, as was permitted, were even charged interest on the deferred payments. Yet here the learned United

States Court of Appeals, in its majority opinion, decided that a shareholder who does not pay his debt until February 13, 1935, should not be required to pay any interest.

The majority opinion of the learned United States Court of Appeals further says, in regard to interest, that "The question of interest arises now only because the Receiver delayed so long a time in obtaining approval of the settlement. Under these circumstances we think there is no equitable basis for a claim of interest." But again, the fact that those securities were not sold until February 13, 1935, was not the fault of the shareholders or the Petitioner. If interest is due it is respectfully submitted that the shareholders should not be penalized for the derelictions of the Receiver and the Comptroller.

Assessments amounting to more than $2,500,000 were paid in cash, in full and on time on more than 85% of all the stock of The Bank of Pittsburgh National Association. On account of the large amounts of money involved it is respectfully submitted that it is not inconceivable that many of these shareholders who paid their assessments on time and in cash would have found it necessary to liquidate certain of their assets so as to provide funds with which to pay these assessments. Under the decision of the learned United States Court of Appeals the payment of the assessment debt of the Respondent was allowed to be deferred until February 13, 1935. If the other shareholders would have been permitted to wait until that date, on account of the securities market having improved, they undoubtedly would also have made a profit which they were not permitted to realize.

If the Respondent should be permitted to have effect given to this compromise as of February 13, 1935, rather than as of the date of the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania, on May 24, 1932, it will realize a considerable advantage over the other shareholders which would be most inequitable. In the dissenting opinion of Judge O'Connell in this connection the following inquiry is made:

> "(a) Are the rights of stockholders, those who pay their assessments in full in cash promptly as well as those who settle their liability to the receiver by the innumerable varieties of compromise settlements, to depend upon the fortuitous circumstances of the conditions of the security market as of the date of a decree by the district court approving such compromise settlements? Why the date of the decree?"

If the opinion of the learned United States Court of Appeals is sustained the cost to each of the more than 1100 shareholders who paid their assessments in cash and on time would be in excess of 36¢ per share. In other words, a preference would be given to one shareholder who owned only 693 shares over a number in excess of 1100 representing 51,892 shares of a total of 60,000 shares.

IV.

The majority opinion of the learned United States Court of Appeals is contrary to "Instructions to National Bank Receivers" in accordance with which the assets in the possession of receivers of national banks have heretofore been administered.

In "Instructions to National Bank Receivers" (Office of Comptroller of the Currency, 1932) in c. IV, Schedules H-1, H-2 and H-3, pages 22 and 23, there is the following:

> "Losses incurred through collections from bankrupt estates and other estates which are settled and finally closed in accordance with usual legal process through the courts may be entered without the necessity of a court order or the permission of the department."

In the instant case, there was a collection made by the Receiver from a decedent's estate in accordance with the practice, rules and laws relating to the Orphans' Court of Allegheny County, Pennsylvania. Accordingly, this account "was settled and finally closed in accordance with usual legal process through the courts." Therefore, it is respectfully submitted that by virtue of this portion of the instructions of the office of the Comptroller of the Currency approval of the Comptroller and an order of court were unnecessary in this case and that title to the assets vested in the Receiver upon delivery. It may be that it was on account of this instruction that the Receiver and the office of the Comptroller of the Currency did not obtain an order of Court in 1932 when the assets were delivered to the Receiver. Under this instruction it would seem that it was unnecessary.

Another portion of said "Instructions to Receivers" in c. IV, pages 34 and 35, in regard to the method of bookkeeping, is as follows:

> "For example, if a receiver holds a bill receivable secured by collateral and finds it necessary to acquire title to such collateral by accepting it at an agreed valuation less than the face of the bill receivable, the price at which it is accepted is, of course, credited on the bill receivable, leaving a balance still due thereon. In such cases the assets in a receiver's hands are not increased and so no entry should be made in Schedule A."

It is respectfully submitted that if title to the assets involved did not vest in the Receiver when they were turned over to him by the Respondent then they must have been held by Petitioner as collateral for the payment of the debt and this is true even though it may be said in a sense, as the opinion of the District Court in this case stated, that they were held in trust. If they were held in trust they were held in trust for the payment of the assessment debt and subject to an "agreed valuation less than the face of the bill receivable" in which case, if the Receiver acquired title to the assets, credit, according to these instructions, would only be given for the agreed value which was exactly what was done in this case. Again, it may be that this was another reason why no approval of the Comptroller or order of court was obtained.

Also in said "Instructions to National Bank Receivers", c. VI, Section 5, pages 44 and 45, it is said:

> "When a debtor proposes to compromise his obligation to the bank the receiver should obtain the full-

> est information possible regarding his financial standing and ability to pay. If he is certain the debt cannot be collected in full the compromise proposition should be submitted to the Comptroller, with a full and complete statement of the debtor's resources and the receiver's recommendation as to whether the compromise should or should not be made. If the proposition is approved by the Comptroller and authorized by a court of competent jurisdiction, the compromise may be effected.

In this case, under the theory of the Respondent, the debtor proposed to compromise its obligation and it is respectfully submitted that it must be assumed that the Receiver conformed to these instructions and obtained the fullest information possible regarding the financial standing of the debtor. The Receiver must have concluded that the entire debt could not have been collected because he submitted the compromise proposition to the Comptroller for approval. Such approval was forthcoming and authorization by a court of competent jurisdiction was had. Thereupon, the Receiver possessed authority to effect the compromise, which he did. It is respectfully submitted that this concludes the proposition and that, as stated in the dissenting opinion of Judge O'Connell, the compromise may not now be attacked in a collateral proceeding.

V.

The majority opinion of the learned United States Court of Appeals entirely ignores the fact that under their opinion they were without jurisdiction.

On February 13, 1935, the date of the order of the District Court of the United States for the Western District of Pennsylvania, the values of the assets involved, together with interest and dividends collected by the Receiver, amounted to $42,783.35 (R. 50a, 51a, 52a) but the debt owed to the Receiver was only $35,654.35 (R. 2). Accordingly, there were more than sufficient funds on February 13, 1935, to pay the debt in full. There, therefore, could not possibly have been a compromise under those conditions but only a payment in full. If the majority opinion of the learned United States Court of Appeals is sustained holding that the values are to be taken as of the said date of February 13, 1935, then the Court is having the Comptroller approve a transaction as a compromise when there were more than sufficient funds to pay the debt in full. The Comptroller would never have done any such thing. He must, therefore, have approved the transaction as of the date when the assets were delivered to the Receiver, at which time the value of the assets was not sufficient to pay the debt and under which circumstances a compromise would naturally have been the method employed. Under the theory of the Respondent, if the compromise is to be effective as of February 13, 1935, then the value of the assets was more than sufficient to pay the debt in full and there could not have been a compromise. This being true, the court was then without jurisdiction as stated by Judge O'Connell in his dissenting opinion.

Only if the values as of the date of the decree of distribution are taken, as contended by Petitioner, could there be a compromise in this case and would the court have jurisdiction. Since the Respondent insists that there was a compromise, it is respectfully submitted that it cannot be heard to contend that the values should be taken as of the date of February 13, 1935, when any possibility of a compromise existing is precluded.

Respectfully submitted,

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